

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

DEREK J. RAMSTAD

Claimant

V.

U.S.D. 229

Self-Insured Respondent

Docket No. 1,059,881

ORDER

STATEMENT OF THE CASE

Claimant requested review of the June 18, 2015, motion hearing Order entered by Administrative Law Judge (ALJ) Steven J. Howard. Michael W. Downing of Kansas City, Missouri, appeared for claimant. Christopher J. McCurdy of Overland Park, Kansas, appeared for self-insured respondent.

The ALJ sustained respondent's motion to dismiss with prejudice, filed more than three years after the filing of an application for hearing and absent any motion filed on claimant's behalf, pursuant to K.S.A. 2011 Supp. 44-523(f)(1).

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the September 28, 2012, Preliminary Hearing and the transcript of the June 16, 2015, Motion Hearing, together with the pleadings contained in the administrative file.

ISSUES

Claimant argues the ALJ improperly dismissed his claim because he was proceeding to regular hearing within the statutory time period. Further, claimant contends the ALJ should have considered whether good cause had been established before dismissing the claim.

Respondent maintains the ALJ's Order must be affirmed. Respondent argues claimant failed to file the required motion for extension of time within the three-year period, and the ALJ has no discretion in a matter mandated by statute.

The issue for the Board's review is: was dismissal of this claim pursuant to K.S.A. 2011 Supp. 44-523(f) appropriate?

FINDINGS OF FACT

On March 2, 2012, claimant filed an Application for Hearing (E-1) alleging injuries by repetitive trauma to his neck, shoulders, back, and right upper extremity. Following a preliminary hearing, the ALJ ordered an independent medical examination (IME) on September 20, 2012. In an IME dated October 10, 2012, Dr. Thomas Phillips opined claimant required no further treatment related to his neck. Dr. Phillips indicated claimant's right arm muscle was likely torn in the work accident and recommended conservative treatment.

At a Prehearing Settlement Conference conducted on October 14, 2013, the ALJ ordered an IME from Dr. Vito Carabetta. Dr. Carabetta generated an IME on June 9, 2014, in which he determined claimant to be at maximum medical improvement. Dr. Carabetta's report was received by the Division of Workers Compensation on June 16, 2014.

Respondent filed an Application for Dismissal on April 8, 2015, indicating claimant had not proceeded to regular hearing, settlement hearing, or an agreed award within three years from the date of the E-1 filing. Claimant did not file a motion for extension. A motion hearing was held on June 16, 2015, and the ALJ dismissed claimant's claim on June 18, 2015. Claimant timely appealed.

PRINCIPLES OF LAW

K.S.A. 2011 Supp. 44-523(f)(1) states:

In any claim that has not proceeded to a regular hearing, a settlement hearing, or an agreed award under the workers compensation act within three years from the date of filing an application for hearing pursuant to K.S.A. 44-534, and amendments thereto, the employer shall be permitted to file with the division an application for dismissal based on lack of prosecution. The matter shall be set for hearing with notice to the claimant's attorney, if the claimant is represented, or to the claimant's last known address. The administrative law judge may grant an extension for good cause shown, which shall be conclusively presumed in the event that the claimant has not reached maximum medical improvement, provided such motion to extend is filed prior to the three year limitation provided for herein. If the claimant cannot establish good cause, the claim shall be dismissed with prejudice by the administrative law judge for lack of prosecution. Such dismissal shall be considered a final disposition at a full hearing on the claim for purposes of employer reimbursement from the fund pursuant to subsection (b) of K.S.A. 44-534a, and amendments thereto.

ANALYSIS

Claimant filed his Application for Hearing, Form E-1, with the Division of Workers Compensation on March 2, 2012. K.S.A. 2011 Supp. 44-523(f)(1) requires claimant to

proceed to a regular hearing, settlement hearing, or agreed award by March 2, 2015. Claimant did not do so.

Claimant is allowed to request an extension of the time period by filing a motion to extend the three-year period upon a showing of good cause. The motion must be filed prior to the expiration of the three-year period. No such motion was filed.

The plain language of K.S.A. 2011 Supp. 44-523(f)(1) requires dismissal.

CONCLUSION

Claimant failed to proceed to a regular hearing, settlement hearing or agreed award, or file a motion to extend the three-year statute of limitations contained in K.S.A. 2011 Supp. 44-523(f)(1). Therefore, dismissal is appropriate.

ORDER

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Steven J. Howard dated June 18, 2015, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of August, 2015.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

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Steven J. Howard, Administrative Law Judge